



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

La Crosse County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206794

Pursuant to petition filed November 8, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the La Crosse County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a telephonic hearing was held on Wednesday, December 21, 2022, originating from Madison [Click here to enter text.](#), Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

La Crosse County Department of Human Services
300 N. 4th Street
PO Box 4002
La Crosse, WI 54601

Respondent:



ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of La Crosse County who received FS benefits in La Crosse County.
2. The respondent applied for FoodShare on August 31, 2020, August 19, 2021, and June 22, 2022. Upon each application, the respondent was approved and received monthly benefits as a group of one person household.
3. Respondent was incarcerated during the following periods: June [REDACTED], 2021 – August [REDACTED], 2021, January [REDACTED], 2022 – April [REDACTED], 2022, and September [REDACTED], 2022 – November [REDACTED], 2022.
4. The respondent's FS card was used by the respondent's sister during each of the three periods of incarceration identified in Finding of Fact No. 3.
5. The respondent has the PIN for his EBT card written on the back said of said card.
6. On November 10, 2022, the agency mailed an Administrative Disqualification Hearing Notice to respondent advising him that the agency believed he had committed an intentional program violation and was therefore seeking a one-year disqualification penalty against him, and that a hearing would take place by telephone on December 21, 2022.
7. The hearing notice stated that the agency was alleging that the respondent allowed unauthorized individuals to use his FS card.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, where an overpayment has occurred their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent here failed to appear at the hearing and has not contacted the Division of Hearings and Appeals to claim good cause for failing to appear. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency contended that respondent committed an IPV by allowing unauthorized individuals to use his EBT card while he was in jail. Pursuant to federal regulation, eligible food program benefits may be used only by a FS household or by an individual the FS household selects to purchase eligible food for the household. 7 C.F.R. §274.7(a). Consistent with the above-cited federal regulation, FS policy states:

The cardholder is the only person that can make authorized purchases on the QUEST card, unless he or she verbally authorizes another person to make purchases on their behalf for their assistance group.

FoodShare Wisconsin Handbook §7.3.2.4.

The agency produced sufficient documentary evidence to establish that a third party had used the respondent's FS card while he was incarcerated during the three incarceration periods noted in Finding of Fact no. 3. The agency's representative also testified that he had concluded that the respondent was acting intentionally because the FS card was used during each of his three incarceration periods, and whoever used the FS card had to have known the PIN. The representative further speculated that the respondent was exchanging his FS benefits for something in return; this was not, however, corroborated by any evidence or testimony at hearing.

The respondent testified that he was not aware that allowing his sister to use his FS benefits was a violation of FS regulations. He stated that he never gave his sister his PIN, but noted that it is written on the back of his FS card. I found the respondent's testimony to be sufficiently credible to rebut the agency's assertion that he acted intentionally in violating FS regulations.

CONCLUSIONS OF LAW

For the reasons discussed above, the petitioner has not established by clear and convincing evidence that the respondent intended to commit an IPV.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

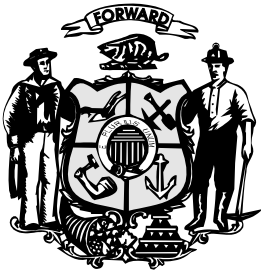
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 20th day of January, 2023



\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals

c: Western Region For Economic Assistance - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Bob Uebele - email



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The preceding decision was sent to the following parties on January 20, 2023.

La Crosse County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]